



**IN THE HIGH COURT OF SOUTH AFRICA
KAWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 407/2023P

In the matter between:

SABELO CELE, T/A AMAHLE BUILDING

AND RENOVATIONS

APPLICANT

And

UMZUMBE LOCAL MUNICIPALITY

FIRST RESPONDENT

THE MUNICIPAL MANAGER, MR T P CELE

SECOND RESPONDENT

UMZUME LOCALA MUNICIPALITY

MANYOBO GROUP JV LUNGAPHI (PTY) LTD

THIRD RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicant has brought an application on an urgent basis seeking the relief as set out in the notice of motion. The matter concerns a tender which was granted by First

Respondent to Third Respondent in respect of the construction of the Phungula Access Road. There were 35 tenders of which Applicant was one. Applicant was however unsuccessful and now seeks interim relief pending a review application which he wishes to bring.

[2] The first issues which arose and which the order of 20 January 2023 provided could still be argued was whether the matter was urgent and should be dealt with as a matter of urgency. The other issue was whether Applicant had made out a case for interim relief. Due to time constraints it was agreed that the parties would address me on both these issues at the same time. The application was not opposed by Third Respondent but only by the First and Second Respondents.

[3] In respect of the issue of urgency it was submitted on behalf of Applicant that it was an application in terms of section 8 of the Promotion of Administration of Justice Act 3 of 2000. The application was issued on 16 January 2023 and the matter was before court on 20 January 2023 where after it was adjourned to 25 January 2023 and to 31 January 2023. It was submitted that it became a matter of urgency on 12 December 2022 when a letter from Applicant's attorney dated 12 December 2022 and wherein it is stated that it is believed that the tender procedure was flawed, procedurally unfair and potentially fraudulent was sent to Respondents. Respondents are therein informed that the tender award is to be challenged. It was submitted that Second Respondent lied in his affidavit as on 31 January 2023 when this matter was heard four affidavits had been obtained from people who Second Respondent stated attended the Bid Evaluation meeting stating that they did not do so.

[5] In respect of the interim relief it was submitted that there was no acceptable evidence to support the merits by Respondents and that they were not truthful. Applicant had a clear right, fraud was perpetrated and First and Second Respondents indicated that they would respond in terms of PAJA and that the road construction

would proceed. It was submitted that the attendance register attached to the answering affidavit related to 14 June 2022 and did not refer to this case. It was submitted that Applicant had made out a case for a temporary interdict.

[6] It was submitted on behalf of First and Second Respondents that the cause of the action arose on 14 November 2022 and that there is nothing in the founding papers of Applicant indicating that it only arose on 12 December 2022 as alleged. After 14 November 2022 it was not mentioned that there was any fraud committed until the correspondence of 12 December 2022. The reply by Respondents on 15 December 2022 was justified. Applicant does not state what caused the so called fraud. It was only on 12 December 2022 that Applicant threatened with an urgent application. This was responded to on 15 December 2022 but nothing happened thereafter. The papers were only issued on 16 January 2023. Applicant's founding affidavit was signed by him on 13 January 2023 which indicates that nothing was done since December 2022.

[7] As far as the interim relief was concerned it was submitted that there was no fact in the founding affidavit disclosing the basis for such relief. Even up to the reply no such case has been made out. In the founding affidavit in paragraph 23 it was set out that the challenge of the correctness of the merits of the determination of the finding in respect of the BEC and NBAP is presently academic in the light of the facts of the legal basis relied upon in the judicial review proceedings. It was submitted that the minutes of the meeting attached to the answering affidavit deals with the tender and indicates that it was held on 13 June 2022 and that one of the issues was the construction of Phungula Access Road. The applicant fell out in the first round and was therefore unsuccessful and was then not considered by the Bid Adjudication Committee.

[8] Applicant contends that in paragraph 41 of the founding affidavit it demanded that affidavits from the Bid Adjudication Committee be provided by Respondents and that they were not all provided and therefore certain people were subpoenaed to attend

court to sign the affidavits that were then handed up indicating that there is a dispute as to the process followed at the said meeting. Accordingly Applicant has shown a clear right and that due to the festive season, no steps could be taken after 15 December 2022 and that there were consultations on 22 December 2022 with counsel.

[9] It would appear from the papers and the submissions made that although the matter was before court for the first time on 20 January 2023 it was adjourned to 25 and then 31 January 2023 for the parties to either file affidavits or supplement their papers and was then heard on 31 January 2023.

[10] It is common cause that Applicant was well aware that the tender was not granted to it and then appealed that decision. A copy of the appeal decision is attached to the founding papers and it was communicated to Applicant on 14 November 2022 that his appeal had been dismissed. Applicant was therefore on 14 November 2022 well aware that the internal remedies had been completed and that his only alternative would now be a review application. Applicant wants to bring an application in terms of section 8 of PAJA for the review. What is sought at this stage is an interdict that the tender which was awarded be stayed and that the construction of the road by Third Respondent does not proceed. The issue therefore, at this stage, is whether Applicant proceeded with sufficient urgency to obtain an interim interdict. The provisions of the Rules of the High Court relating to applications are still applicable even if an application is brought in terms of PAJA.

[11] On the papers there is no indication that anything was done by Applicant about this matter until the letter from the attorney on 12 December 2022, approximately one month later. A perusal of the founding affidavit does not indicate when Applicant contends that it came to his knowledge that there had been fraudulent conduct on the part of First and Second Respondents. There is no indication that this only came to his

knowledge during January 2023 because it in actual fact indicates that consultations were held during December 2022 with regard to this application.

[12] Firstly as already stated there is no indication why nothing was done from 14 November 2022 till 12 December 2022. In my view what is being sought is an interdict preventing the implementation of the tender until the review has been finalised. Accordingly this should have been done immediately when the appeal was dismissed. There is no explanation why from 12 December 2022 nothing was done until 16 January 2023 especially when consultations were held on 22 December 2022. The fact that consultations were held on 22 December 2022 is indicative that Applicant at that stage realised that the matter must be dealt with immediately. The fact that it was festive season did not prevent Applicant from coming to court as the court operated during the festive period. Further there is no explanation why nothing was done early January 2023. It was only set down for 20 January 2023 which was long after the festive season had ended and accordingly in my view it would appear that Applicant caused the long delay. It was due to Applicant's failure, that it was not heard much earlier. It was approximately 2 months after they knew that the appeal was dismissed that the application was brought. The urgency was therefore of his own making and it has not been shown on the papers that the matter is urgent at this stage.

Order:

The matter is accordingly struck off the roll with costs.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED: 31 JANUARY 2023

JUDGMENT HANDED DOWN: 6 FEBRUARY 2023

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